Disestablishment Suits

What Hath Science Wrought?

Mary R. Anderlik, J.D., Ph.D.

Institute for Bioethics, Health Policy and Law, University of Louisville School of Medicine

Developments in science and technology are raising questions about established principles and procedures for determination of parentage. DNA-based identity testing, long used in the public realm to establish father-child relationships, is increasingly employed to challenge legal paternity and its attendant obligations. So-called disestablishment suits have ignited a charged debate centering on the interests of children and the rights of fathers. This article begins by describing the context of the debate, then provides an overview of the complex legal landscape of disestablishment suits, discussing factors contributing to the issue's complexity as well as underlying policy considerations, the "legislative backlash" generated by court decisions restricting disestablishment suits, and the solutions proposed in the revised Uniform Parentage Act and the American Law Institute's *Principles of the Law of Family Dissolution.* The article concludes with a review of points that remain to be considered,

Continued on page 4

The first wave of DNA-based identity testing coincided with an aggressive program of paternity establishment for nonmarital children receiving federal welfare benefits. Although this development was significant, the public purposes behind testing were well understood, the rules for testing were relatively clear, and the program was consistent with long-standing public policy commitments to establishing family relationships and promoting responsibility. The second wave of testing to verify or disprove paternity in child support proceedings that is currently under way is quite distinct from the first: it is driven by private interests, the rules for testing are unclear, and the genetic test results increasingly have the effect of disrupting, or "disestablishing," parent-child relationships and triggering demands for the elimination of an adult's financial responsibility for a child. Courts and state legislatures are searching for ways to reconcile the competing rights and interests of parents, nonparents, and children. So far, there is little evidence of consensus.

In collaboration with the Hastings Center, an independent, interdisciplinary research institute located in Garrison, New York, the Institute for Bioethics, Health Policy and Law at the University of Louisville School of Medicine is studying the ethical, social, and legal issues surrounding DNA-based identity testing as it affects families. In particular, we are working with a group of expert consultants in law, philosophy, social science, and social services to advance understanding of these issues and contribute to a coherent policy response. At this point we are not making the case for a particular position. We offer, instead, a review of developments in science, society, and the law and an overview of legal and policy options. We invite comment from those in the field.

THE CHALLENGE FROM SCIENCE

The current problem consists of a confrontation with the potentially destabilizing effects of DNA-based identity testing and, more particularly, paternity testing. This problem would not exist were it not for advances in science and technology. The Human Genome Project has accelerated the development of techniques for cheap, efficient analysis of DNA and comparison of genetic profiles. Scientists and engineers are constantly refining those techniques, so that testing is becoming ever faster, cheaper, and more widely

Continued from page 3

including standards for genetic testing and significant privacy issues, the requirements for standing to bring a disestablishment suit, the elements of the best-interest analysis, the handling of arrearages and claims for recoupment, fraud and related actions against the mother, alternative dispute resolution, and arguments regarding the proper use of estoppel. ■

This article draws on research funded by the National Institutes of Health, Grant No. R01 HG02485-01, "Genetic Ties and the Future of the Family." The views expressed are the author's own and do not represent the opinions or policies of the National Institutes of Health. *Please direct correspondence regarding this article to Mary R. Anderlik, Institute for Bioethics, Health Policy and Law, University of Louisville, 501 East Broadway, Suite 310, Louisville, KY 40202 (tel.: 502-852-4983; fax: 502-852-4963; e-mail: mrande02@gwise.louisville.edu).*

The author wishes to thank Dr. Laura Gahn of Identigene for her guidance on technical issues and Mark A. Rothstein, director of the institute, for his guidance and support throughout the writing of this article and for suggesting the typology of positions used in the second section. The research assistance of Ms. Elizabeth Stepian is gratefully acknowledged.

available. Even with existing technologies, analysis can be performed on DNA extracted from almost any biological material, which has important implications for privacy. While testing at one time involved a blood draw, many laboratories now offer testing with sample collection by mail (sometimes referred to as "mail-order" or "home" testing) using cheek swabs. Testing of hair and other materials easily collected without the knowledge or cooperation of the subject is increasingly available.[1]

The Human Genome Project has also increased interest in genetic identity. For example, there is a greater emphasis on the genetic family as an aspect of health care. Diagnostic testing for inherited conditions associated with heightened disease risk will sometimes produce ambiguous results, and a thorough family medical history or testing of genetic relatives may provide information useful in clinical decision making. Likewise, DNA testing and genetic relationship are important in identifying prospective donors who match on relevant biological properties for the purposes of organ and tissue transplantation.

The new emphasis on genetic identity is not confined to the clinical context. It has reinforced the view that biological relationship and parental status are tightly linked. DNA-based identity testing has now become part of the culture, with paternity testing a staple of talk shows and daytime and primetime dramas.[2] Media attention and the marketing efforts of laboratories have contributed to demand for testing by sowing suspicion about paternity and fidelity and suggesting that testing is a natural and acceptable response to suspicion. Given the growing influence in both the law and popular culture of genetic thinking and "genetic essentialism," it is easy to slide into the view that genetic contribution is the essence of family and fatherhood.[3] And if proof of paternity by means of genetic testing establishes a duty of support, then, the reasoning goes, exclusion through testing should end that duty.

Reliable evidence concerning the extent of misidentified paternity in the general population is not available. There are some indications that the number of cases may be surprisingly high.[4] Historically, the law has favored familial stability over genetic accuracy in attribution of paternity in circumstances where definitive proof of paternity or nonpaternity was not obtainable. Science and technology have all but eliminated these circumstances. Should the law change as well?[5]

A REVIEW OF THE LEGAL LANDSCAPE

The stories of men such as Gerald Miscovich,[6] Dennis Caron,[7] and Morgan Wise[8] have been the catalysts for debate concerning a husband's power to terminate legal responsibility where testing reveals or confirms the absence of biological relationship. Cases in which men attempt to end child support obligations assumed in connection with a voluntary acknowledgment of paternity raise a similar set of issues. Both kinds of cases create concerns

about the psychological, emotional, and financial welfare of the children and adults involved as well as concerns about fairness. Furthermore, the financial importance of a parentage determination does not end with child support; social security, health insurance, survivors' benefits, military benefits, and inheritance rights hang in the balance. There are also broader social policy considerations, even where the disappearance from the scene of a presumed, an acknowledged, or an adjudicated father has no consequences for the public purse. If stable family units are the foundation of a well-ordered society, the destabilization of the family may lead to social chaos. Nevertheless, the possible consequences of such policies have not been widely recognized. While the men bringing delayed disestablishment suits have often been unsuccessful, losses in court have sometimes translated into victories in the legislature.

A COMPLEX BACKGROUND

A long and convoluted history lies behind the presumption that a husband is the legal father of the children born to his wife during their marriage, a presumption commonly referred to as the "marital presumption" or "presumption of legitimacy," and with advances in testing, the application of the presumption has become a matter of increasing perplexity. California may be unusual among the states in having a "conclusive" marital presumption, but in fact even in California the situation is not as simple as the adjective might suggest. Presumptions linked to marriage are supplemented by other presumptions based on a man's conduct toward a child. For example, in California, as in many states, a presumption of paternity arises when a man receives a child in his home and openly holds the child out as his natural child.[9]

In virtually every state, the law in this area is exceedingly complex. There are at least four sources of complexity: statutes burdened with vestiges of legal evolution, the interplay between family law and rules of civil procedure, the application of equitable doctrines, and constitutional constraints.

Statutes Burdened With Vestiges of Legal Evolution

Historically, the marital presumption was perhaps best characterized as a rule of evidence. Prior to the development of blood tests capable of excluding biological relationship, marital status was a reasonable proxy for biological relationship in circumstances in which a man's status as progenitor could seldom be established with certainty. Where the husband's paternity was a physical impossibility (that is, in cases of absence, impotence, or sterility), the presumption did not apply or could be rebutted. Yet that was not the whole story; the courts developed supplemental rules affecting standing and admissibility of evidence that blocked challenges to legitimacy even in cases where the biological fatherhood of a man other than the husband was all but certain. Hence, other social policy considerations, such as protecting the institution of marriage or the welfare of children, have long played a role in the application of the presumption. With the emergence of human leukocyte antigen (HLA) testing and then genetic testing, some courts "converted" the presumption to a substantive rule of law intended to protect the integrity of the marital family or secure the welfare of children.[10]

The process of historical evolution has, unfortunately, left the law in many states with distinctions that make little sense regardless of rationale. For example, in keeping with the traditional formulations removing cases of physical impossibility from the scope of the presumption, California's conclusive presumption operates only if husband and wife are "cohabiting" and the husband is not impotent or sterile.[11] A related statutory provision allows for challenges based on blood tests, but only for two years after the child's birth.[12] There is little logic here. If marriage with cohabitation operates in paternity determination as a proxy for biological paternity, then blood-test evidence of the husband's exclusion as a potential biological father, like evidence of impotence or sterility, should remove the case from the scope of the presumption. If marriage with cohabitation matters in paternity determination for

social policy reasons, then the same restrictions should apply to all efforts to disestablish the husband as legal father. Given the statutory language and structure, though, at least one court has ruled that proof of impotence or sterility is not subject to the two-year limitation on motions for blood tests.[13]

In addition, in many states, statutory provisions that relate to presumptions of paternity and actions to establish the existence or nonexistence of paternity, standing to invoke or challenge presumptions, and time limits on these challenges have been drawn from diverse sources over time and are lodged in multiple sections of the family law code or title. For example, in California, the conclusive presumption has been grafted onto provisions drawn from the Uniform Parentage Act (UPA).[14] In other states, provisions relevant to paternity establishment and disestablishment may also be found in the law of trusts and estates.[15] In Florida, the law presents a confusing jumble of presumptions and rules relating to obligations of support derived from the common law and statutory procedures for establishment of paternity that can be traced back to a bastardy law enacted in 1828.[16] It is not always clear how these provisions are to be reconciled.

Interplay Between Family Law and Rules of Civil Procedure

The mutual adjustment of provisions in the family code—or a related body of substantive law—and rules of civil procedure becomes an issue when a man's status as legal father has been created or affirmed by a judgment or order, typically at the conclusion of a divorce or paternity proceeding. For example, in 1993 the Alabama Supreme Court denied relief to a man who had reason to question his biological relationship to the child in a paternity proceeding but waited nine years to challenge the paternity judgment with DNA evidence.[17] The court relied on a general rule of civil procedure rather than any limitation in the law concerning parentage determination itself; the procedural rule required that a motion to reopen a judgment owing to mistake or newly discovered evidence be filed within a "reasonable period of time." In 1994, apparently as a reaction to the case, the Alabama Legislature passed a law that allows a defendant declared a legal father in a paternity proceeding to reopen the case at any time with "scientific evidence" of nonpaternity.[18] Likewise, the Maryland Court of Appeals ruled that a statutory provision concerning paternity was subject to a procedural rule that limited the authority of trial judges to alter or amend a final judgment.[19] The state legislature "reversed" this ruling by passing a law making an exception to the finality of paternity orders where a blood or genetic test establishes the exclusion of the individual named as the father in the order.[20]

In a number of cases, courts have refused to find in a woman's silence or reassurance concerning paternity the kind of extrinsic fraud necessary to prompt the reopening of a final judgment. Morgan Wise tried this strategy and lost. According to a Texas court, Wise's allegations that his ex-wife concealed and lied about affairs did not establish extrinsic fraud; rather, these were "allegations of intrinsic fraud concerning an issue that was admitted, uncontested, and settled in the divorce proceeding."[21]

Application of Equitable Doctrines

In addition to the doctrine of res judicata, courts may invoke a number of equitable doctrines to change the outcome in paternity cases. In the context of disestablishment cases, the most significant may be equitable estoppel. *Clevenger v. Clevenger*[22] is perhaps the leading case in California on estoppel in parentage disputes. According to the court, the elements that must be proven to estop a husband from asserting nonpaternity to avoid a child support obligation are (1) the husband represented himself to the child as the child's *natural* father, (2) the husband intended that his representation be accepted and acted upon by the child, (3) the child relied upon the representation and treated the husband as father, and (4) the child was ignorant of the true facts.[23] The application of the doctrine in these circumstances is justified by the benefits already enjoyed by the husband and, perhaps more important, the prejudice to

the child's interests. The "consequences and detriments" of the representation include depriving the child of an action to hold the natural father liable for support at birth (through the mother) and inducing the child to accept the husband as the child's natural father and render to him a child's affection and love, with the concomitant "reasonable expectation of care, support and education until adulthood."[24] A later case adds that an express representation of paternity is not required where such a representation can be inferred from the husband's conduct.[25]

In cases that turn on the application of the doctrine of equitable estoppel, the main points of contention are whether the doctrine applies where the man as well as the child was ignorant of the "true facts" and whether and how financial detriment enters the picture. On the first point, the courts appear most ready to estop a presumed, an acknowledged, or an adjudicated father asserting nonpaternity where the man knew or should have known that he was not the natural or biological father much earlier in time and failed to act. On the second point, courts appear most ready to estop where the alleged detrimental reliance is at least in part financial and there is reason to believe that another man would have been pursued for support had the presumed or acknowledged or adjudicated father taken himself out of the way.[26]

Some commentators urge courts to consider possible gender bias as they exercise their equitable powers. When women advance estoppel arguments against husbands and others on behalf of children, they stand a good chance of losing, whereas men have generally been successful with estoppel arguments when women seek to oust the men from relationships with children. In these cases, there may be a tendency to label the men dupes and the women schemers, with the inequitable application of the doctrine of estoppel the possible result.[27]

Constitutional Constraints

Presumptions and other rules affecting parentage determination may impinge on constitutional rights. Usually, challenges are based on the due process clause of the U.S. Constitution or a parallel provision in a state constitution. One common scenario involves a contest between a presumed father and a putative biological father, where establishment of the paternity of the latter amounts to disestablishment of the former.

The most famous case of this nature is *Michael H. v. Gerald D.,*[28] decided by the U.S. Supreme Court in 1989. The issue in *Michael H.* was whether California's conclusive presumption of paternity could survive a due process challenge by a man who had obtained proof of his biological paternity through genetic testing and had taken steps to develop a parent-child relationship. A fractured Supreme Court upheld the California law. Justice Scalia, writing for the plurality, construed the due process clause as a source of protection for *traditional* values. With reference to a line of Supreme Court cases recognizing fathers' rights in relation to nonmarital children, he wrote that those rights arose from the "sanctity" of the "unitary family" rather than biological contribution. Other justices were more solicitous of interests based on biological connection plus some kind of relationship.

Dawn D. v. Superior Court,[29] decided by the California Supreme Court in 1998, involved a triangle similar to the one in *Michael H.* Since the husband and wife were not cohabiting at the time of conception, the conclusive presumption did not apply. The challenge was to a statutory provision derived from the UPA, which incorporates a more expansive and less conclusive kind of marital presumption, as well as other grounds for a presumption of paternity. Standing to rebut this presumption is limited to mothers, children, and presumed fathers. The putative biological father in this case did not qualify as a presumed father of any description because the mother and her husband had prevented him from developing a relationship with the child. The court ruled that biological fathers do not have a constitutionally protected liberty interest in being allowed to form a parental relationship, and hence the restrictions on standing were valid.[30]

Due process considerations were also a factor in *Brian C. v. Ginger K.,*[31] a contest between a man claiming the protection of the conclusive marital presumption and a putative biological father who qualified as a presumed father because he had a pre-existing relationship with the mother and the child. The court said that, under these circumstances, the state interest in the integrity of the family was relatively weak; in contrast to *Michael H.,* there was no extant marital union at the time of the child's birth, although the marital family re-formed thereafter. Hence the due process rights created by a biological connection plus a social relationship would be strong enough to preclude application of the statute to deny the putative biological father the opportunity to test his claims through genetic testing.

In a third variation, in *Susan H. v. Jack S.,*[32] an alleged biological father used the conclusive marital presumption as a defense to a paternity action brought by the child's mother, and the mother countered that its application to block her suit would violate the child's due process rights. She asserted that the child's protected interests included an interest in knowing the truth. In turning aside the due process challenge, the court noted that in this case the biological facts were fairly clear even in absence of a judicial declaration and stated that it was "questionable whether it is to the child's benefit, emotionally and developmentally, to establish biological parenthood for some abstract interest in truthfulness." The U.S. Supreme Court dismissed similar interests in *Michael H.,* and other courts have rejected related claims in cases involving access to adoption records.

The case law in other states is consistent with this pattern, with wide variation in the kinds of interests recognized as constitutionally protected and the strength of the protection accorded those interests when they conflict. In 1993, an Ohio court ruled that a statute *granting* a putative biological father legal standing to establish paternity in relation to a child within an intact marital family violated the due process clause of the state constitution by infringing on the right to marital privacy and the right to raise children without state-authorized intrusion. The court found the state's interest in determining paternity strictly on the basis of genetics "at most insubstantial, if not completely nonexistent."[33] One year later, in striking down a state statute *denying* a putative father standing to establish paternity, the Texas Supreme Court expressed the view that the state's interest in minimizing familial disruptions may have "had merit in an earlier era when the true biological father could not be established with near certainty and when illegitimacy carried a significant legal and social stigma," but that it no longer did.[34]

Rules affecting determination of paternity may also be challenged on equal protection grounds. In Florida, the procedure for establishment of paternity for children born "out of wedlock" can be traced back to the Florida Bastardy Act. As late as the 1970s, the right to bring an action was limited to unmarried women. A married woman who wished to establish the paternity of a man not her husband challenged this restriction. The Florida Supreme Court, in *Gammon v. Cobb,* noted the potential for "anomalous" situations where "the reputed father of an illegitimate child born to his wife can attack the child's parentage and be relieved of the obligation to support the child, but at the same time the wife may not maintain a suit to compel the putative or natural father to provide support for the child."[35] Given that the purpose of the law was to protect the interests of (illegitimately conceived) children and impose a support obligation on natural fathers, the portion of the law limiting actions to unmarried women was unconstitutional.

Equal protection issues also arise in connection with "backlash" laws of the type discussed in greater detail later in this article. An early example illustrates the point. As noted above, the Alabama Legislature, as a reaction to a specific case, passed a law allowing a defendant declared a legal father in a paternity proceeding to reopen the case at any time with scientific evidence of nonpaternity.[36] By its terms, the law benefits only male defendants; it would not appear to allow a mother or child to reopen a case on the basis of scientific evidence. In fact, an equal protection challenge to the law surfaced in the case of *S.M.V. v.*

D.W.M.,[37] but the appellate court declined to address the issue as it was not raised before the trial court.

POLICY CONSIDERATIONS

A basic question underlying much of the policy debate regarding parentage determination is, To what degree should biology control the formation of families and, more particularly, the award of the rights and responsibilities of parenthood? The possible responses can be organized in terms of four positions.

1. Biological imperative. For those who adopt this position, legal rules and outcomes are, or ought to be, dictated by biology. Parenthood and the rights and responsibilities associated with parent-child relationships are seen as necessarily grounded in and flowing out of biological relationships. This is an ancient and still highly influential way of thinking about the family. On the one hand, this position may reflect a view that biological connection itself creates a bond between parent and child so strong that separation is virtually unendurable, so powerful that the biological parent is compelled to subordinate his or her own interests to those of the child. Therefore, biological matching of parent and child must, in some sense, advance the welfare of the child, since the parent known or revealed as having a mere social connection to the child will inevitably fail to fulfill the child's deepest needs. This view may be fostered and strengthened by the increasing attention to genes and genetics in the media. On the other hand, the biological imperative may be viewed solely in terms of financial responsibility. Engaging in activity that may produce a child creates a duty to pay; conversely, one should not be required to pay for a child for whom one is not causally responsible.

2. Biological presumption. For those who adopt this position, all other things being equal, biology controls. In other words, claims based on biology may sometimes be limited to accommodate important individual rights and interests (child or adult) or to serve the interests of society, but the burden of proof is clearly on the one arguing for a departure from biology. By making biology nearly, but not quite, controlling, it is possible to preserve some of the benefits associated with having a "bright-line" rule—for example, efficiency in decision making, with fewer cases going to the courts and faster resolution when they do. Also, if the belief that genetically related adults are likely to be better nurturers of children than other adults has any truth to it, there is reason to favor biology, with exceptions permitted only to avoid bad results or serious violations of rights in particular cases. By allowing some room for rights and other types of claims not based in biology, this position is in line with broader trends in law and public policy concerning the family. For example, intention has become increasingly important in family law, as reflected in cases dealing with assisted reproduction. In addition, there has been a movement to make the best interest of the child the standard for decision making in areas of law affecting children despite worries that it is vague and open to bias in application.

3. Biological relevance. *Relevance* means that biology counts—along with other factors. Biology is entitled to some weight, but it is not the whole story nor perhaps even the most important part of the story. The view that biological relationship is the exclusive determinant or essence of the parent-child relationship has never been without challenge. The Romans used the term *alumnus* to designate an abandoned child taken in and raised by a biological stranger. Inscriptions establish that such children were cherished, and indeed, such an arrangement could be cited as a model of the kind of disinterested love and kindness characteristic of the highest forms of human relationship.[38] A contemporary parallel would be the celebration of "psychological parenting." As Goldstein et al. define the term, "for the child, the physical realities of his conception and birth are not the direct cause of his emotional attachment. This attachment results from day-to-day attention to his needs for physical care, nourishment, comfort, affection, and stimulation."[39] A reduction in the emphasis on the biological tie may also reflect greater comfort

with the idea that, through their relationships with children, presumed fathers may incur responsibilities that continue even after the biological basis for the relationship is revealed as an illusion. While the law cannot force men to continue as psychological parents, it could foster and reinforce an expectation that bonds of affection and care nourished over time will sustain the relationship once the initial shock of a finding of biological exclusion has passed.

4. Biological indifference. Opposite the biological imperative is the position that biology is a matter of indifference. According to this view, policy, and outcomes in particular cases, should be dictated by one's intention to parent, one's engagement in parenting behavior, considerations of child welfare, or social factors such as the goal of strengthening the institution of marriage. If biology is to be considered at all, it is solely as a matter of convenience. For example, for pragmatic reasons, a society might decide that children should stay with birth parents unless and until some kind of dispute arises. In the event of dispute, the judge charged with assigning parental rights and responsibilities would ask which person would be the better parent—that is, the more nurturing parent, the more consistent presence, the one better equipped financially to support the child, and so on. Biological relationship to the child would have no independent significance.

The "biological imperative" position seems to show up most frequently in concurring or dissenting opinions, suggesting that it is somewhat idiosyncratic among judges. Concurring in part and dissenting in part in a disestablishment case, a justice on the Alabama Supreme Court wrote: "While debate continues over the relative influences of heredity and environment, one thing is clear—the mystic bonds of blood are strong. The strength of these bonds is illustrated in various ways and is observable in ordinary experience. A familiar example is that of adopted children who are nurtured to maturity by exemplary adoptive parents, but, nevertheless, ultimately feel compelled to seek out their biological parents. . . . A strong sense of personal identity is an asset, and personal identity derives in large measure from knowledge of, and association with, individuals of biological kinship."[40] Allied with this view are statements that science promises truth concerning fatherhood. For example, in his *Michael H.* dissent, Justice Brennan wrote that California law "stubbornly" insisted on labeling the mother's husband as father in the face of evidence showing a 98 percent probability to the contrary.[41] The idea of a biological imperative also appears to exert considerable influence on some state legislators, as discussed in the next section.

The two intermediate positions are, perhaps predictably, given wider expression. Their influence on legislators can be detected in "hybrid" statutes that make biology determinative for a limited period of time, and their influence on judges is reflected in a willingness to moderate the effects of bright-line rules in disestablishment cases. *In re Paternity of Cheryl,* decided by the Supreme Judicial Court of Massachusetts in 2001, is a good illustration.[42] In that case, a man who became a legal father by means of a voluntary acknowledgment moved to set aside the judgment based on genetic tests obtained five years later. The court ruled against him in light of his failure to exercise his right to genetic testing before acknowledgment, evidence of the development of a father-child relationship, and his persistence in the relationship even after he had reason to suspect an absence of biological connection. The court affirmed the public interest in the finality of paternity judgments, citing the best interest of the child. Furthermore, in the best-interest analysis the court stressed stability and continuity. The court was careful to note the empirical foundation for this weighting of factors: "Social science data and literature overwhelmingly establish that children benefit psychologically, socially, educationally and in other ways from stable and predictable parental relationships. This holds true even where the father is a noncustodial parent or where the stable relationship is with an individual not genetically linked to the child."[43] Yet the court did not declare biology irrelevant. Having noted the anomaly of continuing to enforce a legal

relationship that was based solely on an asserted biological connection in the face of proof of that connection's absence, the court suggested that a different result might be required if a man challenged a paternity judgment promptly upon obtaining information raising doubts about the judgment's biological basis.

Intermediate positions allow for considerable flexibility and may be associated with greater receptivity to nonexclusive family structures. In Louisiana, cases brought by marital children seeking benefits based on recognition of the paternity of their extramarital biological fathers opened the door to a variety of actions, eroding the "fiction" that the legal father was the only father.[44] But the legal or presumed father did not simply go away. The Louisiana courts recognize the potential for continuing responsibilities and rights if no disavowal is made within the statutorily prescribed period and if this continuation is in the best interest of the child.

The judgment whether the legal or presumed father's continued involvement would be in the child's best interest is context-specific. For example, in *Geen v. Geen,*[45] the legal father and primary custodial parent retained that status even after testing proved that another man, who eventually married the mother, was the biological father, and even after the mother and her new husband sought custody. The decision rested on a best-interest analysis that gave most weight to psychological parenthood: "Geen has provided Ryan with a stable, wholesome environment, a permanent custodial home, and a close and continuing, loving relationship since Ryan's birth, always putting Ryan's interest above his own. He has fed him, dressed him, bathed him, provided medical care, and selected a school, after thoroughly investigating that school. From the very beginning, he has encouraged and facilitated a close and continuing relationship between Ryan and his other two parents."[46]

As might be expected, adoption of the position of biological irrelevance is rare in law. Both Justice Scalia in his *Michael H.* opinion and the Ohio court that held unconstitutional a challenge to a husband's paternity use language suggestive of that position, but in the specific context of a third-party challenge to the sanctity of the intact marital family.[47] In a number of states, it is at least clear that biological relationship is not privileged. The Supreme Court of Hawaii recently declared that the presumption of paternity based on genetic testing "is not more important" than other presumptions, such as the one based on marriage.[48] The Supreme Court of Colorado has strongly affirmed that the best interest of the child must be the paramount consideration throughout any paternity proceeding.[49]

California's semiconclusive, semirebuttable presumption of a husband's paternity within marriage suggests a position of biological relevance: biology is not the whole story or even the most important part of the story. The guiding philosophy of the state statutory scheme might be described as "biology will control determination of paternal responsibility for a limited period early in a child's life" and thereafter the "predominant consideration" will be social relationship.[50] An alternative reading, based on the case law, is that biology plus a social relationship always controls, absent a powerful countervailing private interest supported by the public interest. Courts have readily suspended the operation of the marital presumption when they find that the underlying policy of preserving families is not advanced.[51] This is most likely to occur where a marriage has fallen apart before the battle over paternity, although one court has suggested that the state's interest in preserving and protecting the dignity of parental relationships comes into play "*especially* when a marriage is being dissolved and instability is being introduced into a child's life."[52] In cases involving nonmarital children, there are frequent statements that biology is not as important as an ongoing parent-child relationship.[53]

In California, as in other states, there is considerable turbulence at the moment. In a case decided in 2002, the San Francisco Department of Human Services sought to disestablish a willing, albeit somewhat erratic, presumed father. (This is notable because in cases where a man is subject to a child support order and there is no other potential father

in the picture, the state child support enforcement authority, at least, is typically inclined to ignore biology.) *In re Raphael P.*[54] involved a nonmarital child. Initially, the appellate court in *Raphael P.* concluded that the California statute compels judges to conform legal status to the biological evidence. However, a footnote to that ruling suggested some wrestling with the implications of landing at various points on the spectrum of positions:

> We recognize that the policy implications of any given means of determining paternity (and maternity) are tremendous. When confronted with a man who has every reason to believe he is a child's biological father and who has developed a strong paternal relationship with a child who has no other parent able to assume parental responsibility, it may seem quite difficult to justify termination of the existing relationship solely because of a belated discovery of the absence of a biological tie. On the other hand, obvious problems would be created by a statutory scheme that allowed any person, however unrelated, to forge a parental type relationship with a child which could then potentially be used to assert rights against the child's relatives (by blood or marriage).[55]

And indeed, on rehearing the Court of Appeal reversed itself.

In June 2002, the California Supreme Court weighed in on the issue in a different case. The question in *In re Nicholas H.*[56] was whether a presumption of fatherhood based on receiving a child in the home and holding out the child as one's own is necessarily rebutted when the presumed father seeking parental rights admits that he is not the biological father. The statute, in relevant part, provides that such a presumption "is a rebuttable presumption affecting the burden of proof and may be rebutted in an appropriate action" by clear and convincing evidence.[57] The court's answer to the question turned on its interpretation of the phase "appropriate action." The court ruled that an action is not appropriate where there is a presumed father who has an established relationship with and has taken responsibility for the child and there is no other candidate for the privilege and responsibility of fathering the child.

THE LEGISLATIVE-BACKLASH PHENOMENON

Fathers' rights groups have been vocal participants in debates over the significance of genetic testing for family relationships. Cases in which men are refused release from obligations to children in the face of genetic test results excluding them as biological fathers—or, alternatively, are refused genetic testing—have prompted vigorous advocacy for change in the law. Those within the fathers' rights movement tend to view family law through the lens of criminal law. The crusade to free men of unwanted paternity in such cases is presented as a kind of "Innocence Project."[58] It is common to find the issue framed as one of justice or fairness, in the sense that evidence admissible to "convict" should also be available to "exonerate."[59]

Anger and a desire to strike back at the women involved have clearly been significant factors in the movement, and the same complex of emotions may motivate some disestablishment suits. The Web site for the group U.S. Citizens Against Paternity Fraud is the most emphatic in this regard; it compares paternity fraud to rape and includes a "Hall of Paternity Fraud Victims."[60] In media interviews and documents filed with courts, the men challenging court orders will often say that they do not necessarily want to discontinue support for a child.[61] Rather, they want to end the legal obligation to pay child support viewed as flowing to the women who deceived them in two ways, by cheating on them and by lying to them about a child's paternity.[62]

In some cases the insult seems fresh, but in others long-simmering suspicions, perhaps suppressed or contained in the interests of maintaining a valued relationship with a child, prompt action when a request is lodged for increased child support or the man starts another family.[63] The cynical interpretation is that fatherhood is embraced unless and until it becomes inconvenient. More charitably, financial

or other competing interests fuel resentment against the mother and the legal system for its imposition of responsibilities. The result is a readiness to file an action to disavow paternity, with its implicit rejection of the child, and, if need be, to end the relationship altogether. Men who experience some trigger event will find a "cultural script" to guide response to their predicament that gives little or no place for empathy, care, and caution.

Such niceties have not counted for much where anger over the outcome of a particular case has fueled fierce lobbying in the legislature for a law to correct the perceived injustice. One instance of legislative backlash occurred in Ohio. In 2000, following the uproar over the treatment of Dennis Caron,[64] Ohio passed a law requiring relief from child support orders at any time upon proof of biological exclusion. The right of action is limited to the men subject to the orders.[65] The evidence must be in the form of a genetic test showing zero probability that the man is the father of the child. A marriage to the mother or any admission or acknowledgment of paternity is irrelevant if the man was not aware of his nonpaternity at the time. The court is empowered to issue an order canceling any child support arrearages, and the man is free to commence an action to recover child support already paid. The law includes a declaration that it is a man's "substantive right" to obtain the contemplated relief.

Carnell Smith's case[66] had a similar influence in Georgia. A bill signed into law on May 9, 2002, allows a "male ordered to pay child support" to file a motion to set aside a paternity determination at any time based on newly discovered evidence.[67] Relief is mandatory if specified conditions are satisfied, e.g., testing was properly conducted, the man did not act to prevent the biological father from asserting his rights, and the man did not voluntarily assume the support obligation with knowledge that he was not the biological father.

Targeted laws set the stage for a broader assault on what is perceived as an unjust status quo. On February 20, 2002, a member of the California Legislature introduced a bill proposing a new section of the Family Code under the title "Paternity Justice Act of 2002."[68] As introduced, it included the following legislative declarations:

- In the year 2000, the State of California recognized the validity of DNA testing and created a procedure for an individual convicted of certain crimes to petition a court to reopen his or her case.
- A growing number of states now have antifraud paternity statutes permitting an individual previously adjudicated to be the father of a child to reopen his case and present or obtain DNA testing if he believes he may have been erroneously identified as the father.

The proposed bill provided that fathers' rights advocacy groups were to be consulted in development of the form used for voluntary declaration of paternity, and that the form would have to include, in underlined boldface type, a statement by the mother that the man who had signed was the only possible father (thereby establishing the basis for a charge of perjury). The core provision allowed a man previously named as a child's father in a judgment to move to vacate that judgment if genetic testing yielded a finding of exclusion after the time period for motions to vacate generally had expired. If the man was excluded as the biological father, the bill required the motion to vacate to be granted with few exceptions. The bill passed, though with modifications, such as a provision giving judges discretion to deny a motion based on the best interest of the child, but was later vetoed by Governor Gray Davis. The concept of "paternity fraud" also surfaced in a Vermont bill, introduced in the 2001–2002 session, subjecting a "person who knowingly and intentionally alleges that a person is the biological father of a child when such person knows the allegation to be false" to imprisonment for up to two years or a fine of up to $5,000, or both.[69]

THE UPA 2000 AND THE ALI'S PRINCIPLES OF DISSOLUTION

The revised Uniform Parentage Act (UPA 2000), like the original UPA, includes a presumption of paternity

based on the existence of a social relationship plus conduct indicative of a parental relationship.[70] The UPA 2000 eliminates the rule resolving conflicts among competing presumptions according to "the weightier considerations of policy and logic" on the grounds that "the existence of modern genetic testing obviates this old approach." A proceeding to adjudicate parentage for a child with a presumed father may be commenced within two years after birth (versus five years in the original UPA), but not thereafter.[71] There is also a two-year window for challenges to voluntary acknowledgments of paternity on the basis of "fraud, duress, or material mistake of fact" once the rescission period has passed.[72] The child is not legally bound by a determination of parentage under the act unless the outcome is supported by genetic test results or he or she is represented in the proceeding.[73]

The article concerning genetic testing authorizes a court to deny a request for genetic testing where there is a presumed father if (1) the conduct of the mother or presumed father estops that party from denying parentage and (2) disproving the relationship would be "inequitable."[74] The model law provides that in making its determination, the court "shall consider the best interest of the child," to include, among other things, the length of time elapsed since the presumed father was placed on notice that he might not be the genetic father, the length of time the presumed father occupied the role of father, the facts surrounding the discovery of possible nonpaternity, the nature of the father-child relationship, the child's age, the potential harm to the child, and the potential for establishing paternity with respect to another man. In such a case, a guardian ad litem is to be appointed for the child. A denial of testing by a judge would have to be based on clear and convincing evidence.

If a child has a presumed, an acknowledged, or an adjudicated father, the results of genetic testing are inadmissible to adjudicate parentage unless the test was performed with the consent of the mother and father or pursuant to a court order.[75] According to the commentary in an earlier draft of the UPA 2000, this subsection "is intended to discourage unilateral genetic testing, usually done in the context of a suspicious spouse seeking to determine whether a child is actually the child of the presumed father"; if "such testing cannot be stopped," then at least the results can be excluded.[76] It appears that those able to afford a first round of surreptitious testing to confirm suspicions and a second round of testing in the context of a court proceeding would not be affected.[77]

To date, the UPA 2000 has been enacted by four states, Delaware, Texas, Washington, and Wyoming.[78] Some commentators have asserted that the guidelines for the exercise of judicial discretion are too vague.[79] For example, the law does not provide clear guidance to judges faced with contests between putative biological fathers and presumed fathers during the first two years of a child's life, although the commentary concerning the handling of contests between multiple presumed fathers and the genetic-testing chapter suggest that biology will almost always prevail.

The American Law Institute (ALI) takes a somewhat similar position on these issues in its *Principles of the Law of Family Dissolution.*[80] The ALI principles are concerned with custody decisions and determination of child support obligations rather than parentage determination per se. In keeping with an emphasis on the functional components of parenting, the definition of *parent* includes not only the persons defined as parents under other state law, but also a "parent by estoppel," e.g., an individual who had a reasonable, good-faith belief that he was the child's father, lived with the child, and fully accepted the responsibilities of parenthood for at least two years.[81] In deciding whether to impose a support obligation upon a person who is not a legal parent, courts must consider factors such as how the person and the child have acted toward each other, whether the relationship supplanted the child's opportunity to develop a relationship with an absent parent, and whether the child otherwise has two parents who are able and available to discharge obligations of support.[82]

Like the UPA 2000 provisions on genetic testing in the presumed-father scenario, the ALI principles

have been faulted for failing to provide clear guidelines to judges.[83] Examples are offered, but these do not address the middle-range cases on the spectrum between an 11-year familial relationship and a relationship that terminates before a child's birth. On estoppel, the drafters have been accused of ignoring the case law. According to Theresa Glennon,

> [a] close examination of the reasoning on behalf of the Principles' approach to estoppel and the reasoning adopted by the majority of courts reveals two very different approaches to the underlying issues. These issues involve: the effect of prior financial support and development of a social relationship; the motives of men who seek to disestablish paternity upon divorce; and basic notions of fairness.[84]

In the drafters' defense, it might be argued that these issues are intertwined. An evaluation of the prospects for restoring or holding together functional relationships rests in part on an assessment of the quality of such relationships, in the particular case and in general, and on the factors behind challenges to legal obligations. Fairness is both a criterion for assessment of conduct within a relationship, at least among adults, and an independent consideration that may complement or compete with a determination based upon the best interest of the child or societal welfare. Still, greater clarity in this area would be beneficial.

SURVEY OF CURRENT OPTIONS AND POINTS TO BE CONSIDERED

The possible responses to disestablishment suits include a straightforward best-interest-of-the-child analysis, a statute of limitations approach that makes the lapse of time the decisive factor, a hybrid approach that combines a time bar with a best-interest analysis in at least some spheres (as with the UPA 2000 and the ALI principles), and the "DNA-testing-yields-truth" approach reflected in laws removing any bar to the introduction of genetic evidence to end a legal obligation, at least by the man who is the subject of the obligation.

Proposed, but not yet adopted in any jurisdiction, is a preventative variation of the DNA-testing-yields-truth approach: mandatory genetic testing at birth or at some other key juncture. This may seem far-fetched, but it is being taking seriously in some quarters. In the course of oral argument for a disestablishment case involving the presumed father of a marital child, a justice on the Florida Supreme Court queried, "Are we really saying . . . in the future DNA testing will have to be part of every divorce or custody hearing?"[85] At least one Florida legislator thought the answer was yes. House Bill 73, prefiled in 2001 but withdrawn prior to introduction, would have required DNA paternity testing in all divorce and child support proceedings. And the Supreme Judicial Court of Massachusetts, in a footnote in *Cheryl,* stated:

> Where the State requires an unmarried woman to name her child's putative father, the department should require that the parties submit to genetic testing prior to the execution of any acknowledgment of paternity or child support agreement. To do otherwise places at risk the well-being of children born out of wedlock whose fathers subsequently learn, as modern scientific methods now make possible, that they have no genetic link to their children.[86]

A countervailing consideration in the public context is the cost of genetic testing. Glennon appears to favor testing at birth in all public and private cases as a matter of child advocacy.[87]

Whatever general approach is selected, it must be implemented through a series of more specific choices, including

1. what standards to adopt for genetic testing
2. who has standing to bring an action that has the effect of disestablishing a presumed or an acknowledged or adjudicated father
3. whether a judge has discretion to block testing of children with presumed fathers, and if the judge does, the factors to be considered in his or her analysis as well as the possibility of legal recognition of dual paternity

4. whether any modification of a judgment based on genetic testing is purely prospective (i.e., whether there is potential for recovery of child support already paid or cancellation of arrearages)
5. whether an action is permitted against the child's mother to recover child support already paid, legal expenses, and, potentially, damages for infliction of emotional distress, in addition to or as an alternative to other kinds of relief
6. whether mediation or court-ordered family counseling is encouraged or required
7. whether estoppel arguments are permitted and under what circumstances

1. Testing standards. Although some legislators and judges, and much of the public, take the view that a "genetic test" will provide certainty concerning biological relationship, as a technical matter this is simply not true. Standards may vary even among reputable laboratories. Experts continue to dispute the definitiveness of results from a single round of testing with the widely used polymerase chain reaction (PCR) method. Even without mistakes in sample collection, handling, analysis, or interpretation of results, a finding of inclusion may be reversed with further testing, as in the case of *Cauthen v. Yates.*[88] Given a trajectory of continuing scientific and technological progress, there is also the question of whether to permit a case to be reopened for technical reasons. *In Manning v. Manning,*[89] the court refused to order further testing absent proof by the plaintiff that a new test would yield a result different from the test used in the initial proceeding.

Genetic testing remains a matter of probabilities based on a variety of assumptions. The UPA 2000 allows for a determination of paternity based upon a 99 percent probability of paternity, using a prior probability of .50, and a combined paternity index of at least 100 to 1. According to the comments, the standard was chosen primarily because it conformed to then-current industry practice and could likely be met even in cases involving degraded specimens or missing individuals.[90] The drafters note that even results above this threshold are rebuttable and that a second round of testing will be ordered upon request. However, unsophisticated parties may not understand the technical issues well enough to know when a second round of testing is advisable.

Consent issues add a layer of complexity. Some courts appear little troubled by evidence of a first round of private testing conducted on a presumed father's initiative without the consent of the mother.[91] In barring any action to determine the nonexistence of a father-child relationship *unless* DNA test results showing exclusion are first obtained, Illinois may provide an incentive to surreptitious testing.[92]

The Massachusetts high court had this to say about consent:

> The father apparently obtained the genetic tests on the advice of counsel in 1999. It is, therefore, unlikely that he could be denied relief on the basis of unclean hands. We nevertheless note that the father should have obtained the mother's approval before subjecting Cheryl to the genetic tests, particularly where, as here, a judge had denied him that relief. The father points out that no judge explicitly prohibited him from obtaining the test, that he took Cheryl for testing during a legal visitation period, and that the test posed virtually no risk of physical pain or trauma. Even if the father is correct on each point, absent emergency circumstances, a noncustodial parent must consult with the parent with legal custody of a child before subjecting a child to a medical procedure that may have a significant effect on the child's emotional development. Because the results of a paternity test may, as in this case, lead to protracted paternity litigation, serious conflict between the parents, identity confusion for a child, and an incentive for a parent to withdraw emotional or financial support, the agreement of the child's legal custodian or an order of the court would in most circumstances be required before the noncustodial parent may submit the child to genetic marker and blood group testing years after a paternity judgment has entered.[93]

Further complicating matters, it is apparently not uncommon for the paternal grandparents to under-

take testing in the first instance, and some laboratories in fact advertise "grandparent tests."[94]

If the courts hearing paternity cases fail to sanction testing without proper consent, those adversely affected may have little recourse. Genetic information about paternity is often excluded from the protections contained in state genetic privacy laws. Further, in the majority of states that have such laws, protections are restricted to information or testing relating to a disease, disorder, or syndrome or an illness or impairment. Beyond this, many genetic privacy statutes affect only the conduct of insurers or employers, although a few require that "any person" obtain informed consent before performing a genetic test. There are also jurisdictional issues if the person collecting the sample and the laboratory performing the analysis are in different states, as may well be the case with testing by mail. Although it is important for judges to be alert to privacy issues, the concern expressed by one court over potential insurance or employment discrimination is probably not justified where testing is confined to noncoding regions of DNA, at least so long as there is adequate provision for sample destruction.[95]

2. Standing. Standing issues have been discussed at some length above. In cases involving the usual triangle of husband, wife, and putative biological father, any court will have to take into account the analysis of constitutionally protected interests in *Michael H.* and subsequent cases. More open structures, such as found in the UPA 2000, seem to invite new categories of actors who are differently motivated to disestablish paternity. Examples include the state or a state surrogate, as in *Raphael P.,* or paternal grandparents. Here, too, there may be constitutional issues.[96] With regard to laws that mandate the reopening of paternity judgments because of "scientific evidence" but restrict these actions to male defendants in child support actions, more equal protection challenges should be anticipated.

3. Judicial discretion and factors to be considered. In some states, the best-interest analysis simply has no place in decision making about testing or paternity determination, although the best interest of the child may be considered in relation to such corollary matters as custody or visitation. In other jurisdictions, a best-interest analysis is possible only prior to testing; once a finding of exclusion exists, it must be given legal effect through disestablishment of paternity. This seems unfortunate, since the interests affected by the generation of information through genetic testing may be different, or balance differently, from the interests affected by determinations of legal paternity and decisions concerning support, visitation, and custody.

Some elements are virtually always considered as part of a best-interest analysis, such as the desirability of permanence or stability in the life of a child and provision for material support. Unfortunately, there are no studies that track the effects of different decision rules or guidelines on child welfare. Those who endorse multiple fatherhood must address the concern that diffusion of responsibility will lead to neglect on the part of the parents and confusion on the part of the child. Other elements particularly relevant to the genetic-testing context include identity formation and interests related to health or medical care. Some have put forward a concept of "genealogical bewilderment" to describe the negative psychological consequences of ignorance of one's origins, but the primary evidence for such a phenomenon appears to be literary (e.g., the Oedipal myth and the story of the Ugly Duckling) and anecdotal.[97] The legislative findings and declarations accompanying the California law on voluntary acknowledgment of paternity include the statement that "knowledge of family medical history is often necessary for correct medical diagnosis and treatment."[98] Courts may be more inclined to recognize an interest in an accurate family medical history than an abstract "right to know" one's origins.[99]

Theresa Glennon offers the Oklahoma statute as a model for guidance on best-interest analysis. The Oklahoma law "looks to readily identifiable factors, such as the child's age and residence with the alleged parent," and hence "gives courts a more easily administrable guideline and prevents courts from

having to engage in more detailed, time-consuming, and ultimately confounding inquiries into the 'strength' of the parent-child bond."[100] Glennon favors tailoring time limits and restrictions on disestablishment of paternity to child welfare. In other words, the best interest of the child would trump adult interests. Her argument is reproduced here because it addresses some of the concerns about fairness raised by fathers' rights groups:

> While some individuals are innocent victims of deceptive partners, adults are aware of the high incidence of infidelity and only they, not the children, are able to act to ensure that the biological ties they may deem essential are present…. The law should discourage adults from treating children they have parented as expendable when their adult relationships fall apart. It is adults who can and should absorb the pain of betrayal rather than inflict additional betrayal on the involved children.[101]

The most compelling argument from the fathers' rights advocates may be their assertion that it is fundamentally unfair to hold a man liable for financial support while giving him no protected interest in the opportunity to develop a relationship with a child.[102] If the notion of fatherhood as necessarily an *exclusive* status is abandoned in nontraditional family situations, it becomes easier to join responsibilities with at least some correlative rights.

The empirical assumptions underlying a more-or-less conclusive, exclusive presumption of paternity include

- a man can function as a good parent even where a question has been raised about his genetic connection to a child;
- a marriage can survive the shock of an allegation of infidelity relatively intact;
- social relationships are more important contributors to well-being than genetic relationships, e.g., having an intact family is more important to the child's well-being than having an accurate understanding of genetic origins; and
- even though social relationships count for more than genetic relationships, it is important to preserve the appearance of a neat family unit in which genetic and social relationships are aligned; therefore secrecy, or the suppression of information about (the absence of) genetic connection, may be required for a man to function as a good parent or for a marriage to survive.

The last assumption seems particularly difficult to sustain given the increasing prevalence of blended families. Culturally, the blended family is less of an oddity than it once was, and hence social isolation or rejection is unlikely to result from acknowledgment of familial complexity in the area of biological and social relationship. Further, some studies conducted in the context of assisted reproduction have found that openness concerning a father's lack of biological connection to a child is associated with better outcomes, although there are inherent difficulties with studies of secrecy.[103] The plurality opinion in *Michael H.* invoked "nature itself" to rule out the option of dual paternity.[104] Interestingly, anthropologists have identified 16 societies in South America marked by a belief in "partible paternity," that is, "the conviction that it is possible, even necessary, for a child to have more than one biological father."[105] Although the idea of multiple biological paternity may be at odds with science, short of some tricky genetic engineering, multiple fatherhood may make good social sense.

Mandatory involvement of a guardian ad litem is one procedural means of protecting the interests of children on a case-by-case basis, in the absence of bright-line rules well supported by the results of research concerning child welfare. The UPA 2000 requires involvement of a guardian in cases involving presumed fathers.

A final issue not typically addressed in the best-interest analysis, but perhaps worthy of attention, is the heightened potential for harm where there are multiple children in the family. It is not unheard of for a man to terminate, or attempt to terminate, ties with a child while continuing visitation with siblings

confirmed to be his biological offspring.[106] This seems a recipe for disaster.

4. Modification of judgments. One of the most vexing questions currently is what to do when a statute or an appellate decision directs courts to allow the reopening of paternity judgments. In Maryland, the Court of Appeals, rebuked by the Legislature with a law allowing modification of final paternity judgments, gave the law retroactive application and later ruled that the modification of a judgment cancels any arrearages for child support.[107] On the latter point, a dissenting justice worried that this would provide "a powerful new incentive for men to ignore both the responsibility they voluntarily assumed and their obligation to obey court orders."[108] The Maryland court has not yet ruled on the issue of recoupment of child support already paid; the Ohio law passed in response to *Caron* clearly contemplates the recovery of child support but offers no guidance on the details.

5. Relief. A law review article published in 2000 examines this issue in depth, noting that courts have in the past been unreceptive to lawsuits based on harms connected to misrepresentation of paternity.[109] At the same time, courts in California and elsewhere have not foreclosed the possibility that a man might recover the actual costs incurred in supporting another man's children on a theory of unjust enrichment. In recent years, court decisions in a growing number of states have recognized misrepresentations of paternity as sufficient for claims of intentional infliction of emotional distress.[110]

6. Mediation or counseling. With an increasing emphasis on alternative dispute resolution (ADR) or the offer of resources, the value of mediation or counseling is worth considering. At least one state, Wisconsin, has a law expressly authorizing judges hearing paternity cases to order the parties to attend a program providing training in parenting or co-parenting, with the proviso that it be "educational rather than therapeutic."[111] Few opinions in disestablishment cases describe the use of ADR or related services. In its unpublished opinion in *Rebecca R. v. David R.,* the California Court of Appeal noted the involvement of a family mediator in decision making about genetic testing.[112] In *Stitham v. Henderson,* a case concerning the recognition of de facto parenthood in the aftermath of genetic testing, the Supreme Judicial Court of Maine expressed its hope that "these parties, keeping the best interests of the child uppermost in their minds, either on their own, or with the assistance of an able case management officer and/or mediator, will agree upon the best arrangement for the child."[113] Since a request for an increase in child support seems to be a frequent trigger for private genetic testing and the subsequent filing of a disestablishment case, judges should consider what might be done at that point to head off an ill-considered rush to testing.

7. Estoppel. The issues surrounding estoppel are discussed at some length above and in a number of recent law review articles. The ALI principles suggest a more expansive application of the doctrine of parenthood by estoppel and a widening of the notion of detriment to include psychological harm to a child. Where a man is bringing an action to end a legal obligation of support on the basis of genetic testing, special care is required to avoid creating perverse incentives. For example, if the length or quality of the father-child relationship is a factor in determining whether to continue a support obligation, evaluation should focus on the period *before* the action was filed. Otherwise, there is an incentive for the man to sever the relationship with the child immediately upon receipt of evidence of nonpaternity.[114]

The power of judges to heal fractured relationships is limited. In deciding a disestablishment case in December 2001, the justices of the Wyoming Supreme Court confronted the tragic dimension of their work: "Courts simply are not always capable of resolving the sorts of profound human dilemmas that are brought to their doorsteps, at least not in a way that will avoid all potential hardship to even innocent parties. Here, though Child has two presumptive

fathers, he has none who wishes to fully embrace that role and the responsibility that goes with it."[115] Gearing the law toward modest goals of achieving greater consistency and minimizing harm, especially to innocent children, may be the best policy. In his special concurrence in the Wyoming case, Justice Golden, joined by Chief Justice Lehman, stated that while the "legal system certainly cannot bring love into a family," it should "at least provide a clear and coherent process when called upon to define a family."[116]

Adoption of this sober approach does not, of course, preclude a hope that generosity and affection will triumph eventually. An Iowa man protested the continuation of a duty of support to a son with whom he had at one time enjoyed a warm, loving relationship, labeling it a "charade." The court hearing the case rejected this characterization of the outcome of the disestablishment proceeding, expressing its hope that in the end the father's "heart will follow his money."[117]

NOTES

1. If hairs are pulled (rather than cut) and have intact roots, it is theoretically possible to derive DNA for paternity testing. At the same time, with this kind of sample, a failure to obtain a usable result is more likely than with a standard form of DNA collection. If results are obtained, they are just as powerful and accurate as those from tests using blood or buccal swabs. Interview with Dr. Laura Gahn (Nov. 15, 2002).

2. Alessandra Stanley, *So, Who's Your Daddy? In DNA Tests, TV Finds Elixir to Raise Ratings,* N.Y. Times, Mar. 19, 2002, at C1. At least one case involving "live paternity testing" performed on a TV talk show has made it into the courts. *See* Barbara Ann W. v. David W., 701 N.Y.S.2d 845, 850 (N.Y. Fam. Ct. 1999) (testing that triggered litigation was performed by self-described "paternity expert" Alan Gelb on the *Sally Jesse Raphael* show).

3. *See, e.g.,* Dorothy Nelkin & M. Susan Lindee, The DNA Mystique: The Gene as a Cultural Icon (W.H. Freeman 1995); Genes and Human Self-Knowledge: Historical and Philosophical Reflections on Modern Genetics (Robert F. Weir et al., eds., Univ. of Iowa Press 1994).

4. The evidence in this area is limited. Scientist Jared Diamond describes a personal communication from a respected scientist who conducted a research study of the genetics of human blood groups in the 1940s. Samples were collected at a "highly respectable" U.S. hospital from 1,000 newborn babies and their mothers and the men identified as their fathers. Analysis revealed that in nearly 10 percent of cases, the men tested could not have been biological fathers. Jared Diamond, The Third Chimpanzee: The Evolution and Future of the Human Animal 85–87 (HarperCollins 1992). This information is secondhand and unverifiable because the finding was never published; however, Diamond is himself a highly respected scientist. Even assuming the finding's validity, however, World War II may have been a factor, since an increase in infidelity might be anticipated when spouses or significant others are absent for extended periods of time. Physicians doing tissue typing for organ donation have estimated that from 5 to 20 percent of donors are genetically unrelated to the men identified as their fathers. Barbara Katz Rothman, Recreating Motherhood: Ideology and Technology in a Patriarchal Society 225 (W.W. Norton 1989). Laboratories performing paternity testing consistently report exclusion rates of around 30 percent, but this number cannot be generalized to the population at large for obvious reasons.

5. The question is not limited to the United States. The author of a study of Canadian law concludes that "the judiciary seems to be emphasizing, without providing any detailed justification, a general belief in the social worth of knowing one's biological heritage." Timothy A. Caulfield, *Canadian Family Law and the Genetic Revolution: A Survey of Cases Involving Paternity Testing,* 26 Queen's L.J. 67, 89–90 (2000). He finds evidence of the same trend in European law. *Id.* at 75–76.

6. *See* Miscovich v. Miscovich, 688 A.2d 726 (Pa. Super. Ct. 1997), *aff'd* 720 A.2d 764 (Pa. 1998), *cert. denied,* 526 U.S. 1113 (1999); Maggie Gallagher, *Who's Daddy? It's Not Just DNA,* N.Y. Post, Aug. 14, 1999, at 15; Richard Willing, *DNA and Daddy: Explosion of Technology Is Straining Family Ties,* USA Today, July 29, 1999, at 1A; William C. Smith, *Daddy No More,* A.B.A. J., July 1999, at 30.

7. *See In re* Caron, 110 Ohio Misc. 2d 58, 744 N.E.2d 787 (Ohio Ct. Com. Pl. 2000); *Case Points Out Judicial System Flaws,* Columbus Dispatch, Nov. 18, 2000, at 11A; *Foe of Child Support Laws Is Jailed for Nonpayment,* St. Louis Post-Dispatch, Apr. 30, 2000, at A8; *The O'Reilly Factor: Should the State Force Victims of Fraud to*

NOTES

Pay Child Support? (Fox News Network broadcast, May 16, 2000).

8. *See* Wise v. Fryar, 49 S.W.3d 450 (Tex. Ct. App. 2001); Tamar Lewin, *In Genetic Testing for Paternity, Law Often Lags Behind Science,* N.Y. Times, Mar. 11, 2001, at A1.

9. Cal. Fam. Code § 7611(d) (West 1994 & Supp. 2003).

10. *See, e.g.,* Brian C. v. Ginger K., 92 Cal. Rptr. 2d 294, 298–99 (Cal. Ct. App. 2000).

11. Cal. Fam. Code § 7540.

12. *Id.* § 7541. *If* blood tests are performed in accordance with the chapter concerning blood tests to determine paternity and the experts conclude that the husband is not the father, *then* this section provides that "the question of paternity of the husband shall be resolved accordingly." However, this section restricts motions for blood tests by time and party. Motions for testing may be made only within two years of the child's birth and only by (i) the husband; (ii) a presumed father (as defined in sections 7611 and 7612), only for purposes of establishing paternity; (iii) the child's guardian ad litem; or (iv) the mother, if the child's biological father has filed an affidavit acknowledging paternity. *Id.*

13. Freeman v. Freeman, 53 Cal. Rptr. 2d 439, 444 (Cal. Ct. App. 1996).

14. Cal. Fam. Code § 7611.

15. For example, in Maryland, blood tests for the purpose of establishing paternity may be sought under a provision of the Estates and Trusts Code as well as the Family Law Code. Turner v. Whisted, 607 A.2d 935 (Md. 1992).

16. *See* Chris W. Altenbernd, *Quasi-Marital Children: The Common Law's Failure in* Privette *and* Daniel *Calls for Statutory Reform,* 26 Fla. St. U. L. Rev. 219, 236 (1999).

17. *Ex parte* W.J., 622 So. 2d 358 (Ala. 1993).

18. Act of Apr. 26, 1994, 1994 Ala. Acts 633 (codified at Ala. Code § 26-17A-1 (2003)); *see Ex parte* Jenkins, 723 So. 2d 649 (Ala. 1998) (attributing passage of § 26-17A-1 to denial of relief in *Ex parte* W.J.).

19. Tandra S. v. Tyrone W., 648 A.2d 439 (Md. 1994).

20. Langston v. Riffe, 754 A.2d 389, 393 (Md. 2000) (noting that 1995 Maryland Laws 248 was passed specifically to overturn the effect of *Tandra S.*).

21. Wise v. Fryar, 49 S.W.3d 450, 455 (Tex. Ct. App. 2001), *cert. denied,* 534 U.S. 1079 (2002). A series of recent state supreme court rulings demonstrate the difficulty of disestablishing paternity where a divorce decree or judgment recites that a child is "of the marriage" or contains similar language. *See* D.F. v. Dept. of Revenue *ex rel.* L.F., 823 So. 2d 97 (Fla. 2002); Doe v. Doe, 52 P.3d 255 (Haw. 2002); Betty L.W. v. William E.W., 569 S.E.2d 77 (W. Va. 2002).

22. Clevenger v. Clevenger, 11 Cal. Rptr. 707 (Cal. Ct. App. 1961).

23. *Id.* at 714.

24. *Id.*

25. Freeman v. Freeman, 53 Cal. Rptr. 2d 439, 447 (Cal. Ct. App. 1996).

26. *See* Theresa Glennon, *Somebody's Child: Evaluating the Erosion of the Marital Presumption of Paternity,* 102 W. Va. L. Rev. 547, 578–82 (2000).

27. Theresa Glennon, *Expendable Children: Defining Belonging in a Broken World,* 8 Duke J. Gender L. & Pol'y 269, 280 (2001); Glennon, *Somebody's Child, supra* note 26, at 585.

28. Michael H. v. Gerald D., 491 U.S. 110 (1989).

29. Dawn D. v. Superior Court, 72 Cal. Rptr. 2d 871 (1998), *cert. denied,* 525 U.S. 1055 (1998).

30. Other states have recognized such an interest. For example, in several cases, the Iowa Supreme Court has ruled that putative fathers have a constitutionally protected liberty interest in relationships with their biological children even where another man is the presumed father by marriage. At the same time, the court readily finds a waiver where the putative father delays in pursuing his rights. *See, e.g.,* Huisman v. Miedema, 644 N.W.2d 321 (Iowa 2002); *see also In re* J.W.T., 872 S.W.2d 189, 197 (Tex. 1994).

31. Brian C. v. Ginger K., 92 Cal. Rptr. 2d 294 (Cal. Ct. App. 2000).

32. Susan H. v. Jack S., 37 Cal. Rptr. 2d 120 (Cal. Ct. App. 1994).

33. Merkel v. Doe, 63 Ohio Misc. 2d 490 (Ohio Ct. Com. Pl. 1993).

34. *In re* J.W.T., 872 S.W.2d at 197.

35. Gammon v. Cobb, 335 So. 2d 261, 265 (Fla. 1976).

36. *See supra* note 18 and accompanying text.

NOTES

37. S.M.V. v. D.W.M., 723 So. 2d 1271 (Ala. Civ. App. 1998).

38. Thomas H. Murray, The Worth of a Child 50 (Univ. of Cal. Press 1996).

39. Joseph Goldstein et al., Beyond the Best Interests of the Child 17 (Free Press 1979).

40. *Ex parte* Jenkins, 723 So. 2d 649, 677 (Ala. 1998) (Cook, J., concurring in part and dissenting in part).

41. Michael H. v. Gerald D., 491 U.S. 110, 148 (1989) (Brennan, J., dissenting). Others assert that "father" is a legal construction, not a biological fact. *See, e.g., In re* J.W.T., 872 S.W.2d 189, 202 (Tex. 1994) (Cornyn, J., dissenting). Again, in *Smith v. Organization of Foster Families for Equality and Reform,* 431 U.S. 816 (1977), Justice Brennan, this time writing for the majority, stressed the centrality of biology to family and suggested that solicitude for a constitutionally protected liberty interest founded on blood relationship with a child precludes a similar concern for competing interests founded on social relationship.

42. *In re* Paternity of Cheryl, 746 N.E.2d 488 (Mass. 2001).

43. *Id.* at 494 n.15 (citations omitted).

44. Smith v. Cole, 553 So. 2d 847, 851 (La. 1989).

45. Geen v. Geen, 666 So. 2d 1192 (La. Ct. App. 1995).

46. *Id.* at 1197.

47. *See* Michael H. v. Gerald D., 491 U.S. 110 (1989); Merkel v. Doe, 63 Ohio Misc. 2d 490 (Ohio Ct. Com. Pl. 1993); *see also supra* note 33 and accompanying text.

48. Doe v. Doe, 52 P.3d 255 (Haw. 2002).

49. N.A.H. v. S.L.S., 9 P.3d 354, 365 (Colo. 2000).

50. Freeman v. Freeman, 53 Cal. Rptr. 2d 439, 446 (Cal. Ct. App. 1996).

51. *See, e.g.,* Comino v. Kelley, 30 Cal. Rptr. 2d 728 (Cal. Ct. App. 1994).

52. *See Freeman,* 53 Cal. Rptr. 2d at 448 (emphasis added).

53. *See, e.g., In re* Kiana A., 113 Cal. Rptr. 2d 669 (Cal. Ct. App. 2001).

54. *In re* Raphael P., 118 Cal. Rptr. 2d 610 (Cal. Ct. App. 2002).

55. *In re* Raphael P., 117 Cal. Rptr. 2d 795 (Cal. Ct. App. 2002), *rev'd on reh'g by In re* Raphael P., 118 Cal. Rptr. 2d 610.

56. *In re* Nicholas H., 46 P.3d 932 (Cal. 2002).

57. Cal. Fam. Code § 7612(a) (West 1994 & Supp. 2003).

58. *See* Web site for U.S. Citizens Against Paternity Fraud, *at* http://www.paternityfraud.com (visited Oct. 21, 2003); *see also* Christopher Quinn, *As DNA Tests Rule Out Paternity, Men Sue to Stop Support Payments,* Atlanta J. & Const., May 16, 2001, at 1A ("DNA tests clear nearly one of every three men who contest paternity when named as fathers by women applying for state assistance"); *The Early Show* (CBS television broadcast, Apr. 18, 2000) (quoting Carnell Smith, director of U.S. Citizens Against Paternity Fraud: "At least somebody should get a chance for their freedom here. The innocent man should always be allowed to be set free, based on the evidence").

59. "It's amazing to me that the same evidence that can be used to convict an individual is not readily used to exonerate an individual. You can't have it both ways. If this is the high-tech science we both know it is, the court has to deal with the results, despite the extenuating circumstances." Steve Duin, *This DNA Test Is a Test of His Patience,* The Oregonian, June 6, 2000, at B01 (quoting Brad Popovich, director of the DNA diagnostic lab at Oregon Health Sciences University).

60. *See* U.S. Citizens Against Paternity Fraud, *at* http://www.paternityfraud.com.

61. *See, e.g.,* Monica Brady, *All Things Considered: DNA Testing Is Causing State Courts to Relook at Laws Regarding Paternity* (National Public Radio broadcast, Apr. 9, 2001) (interview with acknowledged father challenging child support obligations in *Cheryl* case, expressing continuing affection for the child).

62. On suits against mothers for misrepresentation of paternity, *see* Linda L. Berger, *Lies Between Mommy and Daddy: The Case for Recognizing Spousal Emotional Distress Claims Based on Domestic Deceit That Interferes With Parent-Child Relationships,* 33 Loy. L.A. L. Rev. 449, 501–08 (2000).

63. *See, e.g., In re* Paternity of Cheryl, 746 N.E.2d 488 (Mass. 2001); K.B. v. D.B., 639 N.E.2d 725 (Mass. App. Ct. 1994); Monmouth County Div. of Soc. Servs. v. R.K., 757 A.2d 319 (N.J. Super. Ct. Ch. Div. 2000).

NOTES

64. Caron was jailed for contempt of court in connection with litigation over the continuation of a child support obligation. *See In re* Caron, 744 N.E.2d 787 (Ohio Ct. Com. Pl. 2000); *Case Points Out Judicial System Flaws, supra* note 7, at 11A; *Foe of Child Support Laws Is Jailed for Nonpayment, supra* note 7, at A8; *The O'Reilly Factor, supra* note 7.

65. Act of July 27, 2000, 2000 Ohio Laws 238 (H.B. 242). There are exceptions for adoption and artificial insemination by donor.

66. Odum v. Smith, No. 98-12744-9 (Ga. Super. Ct. May 14, 2001); *see also* http://www.paternityfraud.com.

67. 2002 Ga. Laws 596, § 1 (codified at Ga. Code Ann. § 19-7-54 (2003)).

68. A.B. 2240, 2001–2002 Sess. (Cal. 2002). The legislative declarations from Assembly Bill 2240 are repeated in Senate Bill 1030, introduced on Feb. 21, 2003. Senate Bill 1030 concerns motions to set aside default judgments of paternity.

69. H.B. 735, 2001–2002 Sess. (Vt. 2002). *See also* S.B. 1710, 2003–2004 Sess. (Fla. 2003); H.B. 2267, 2003–2004 Sess. (Ill. 2003); H.B. 5381, 2003–2004 Sess. (R.I. 2003).

70. Unif. Parentage Act § 204 (2000), as last amended or revised in 2002.

71. *Id.* § 607. Although the text of section 607(a) refers to a paternity proceeding brought by a presumed father, the mother, or "another individual," the comment to that section describes the potential challengers as the mother, the presumed father, and "a third party male." There is one clear exception to the time limit: a proceeding to disprove a father-child relationship, if a court determines that the mother and presumed father had no intimate contact during the probable time of conception and the presumed father never openly treated the child as his own. It appears that this exception would not survive a divorce, since the UPA 2000 provides that a final order expressly identifying a child as a "child of the marriage" or providing for support by the husband is an adjudication of parentage and can be used as a defense by a third party in a subsequent proceeding. *See id.* § 637. The comment states the rationale for the exception: "It is inappropriate to assume a presumption known by all those concerned to be untrue." If this is so, what about a case in which, more than two years after the birth of a child, the results of genetic testing exclude a man presumed to be the child's father solely on the basis of marriage plus intimate contact? Confusion seems to persist about whether the marital presumption is a rule of evidence or a rule of substantive law.

72. *See id.* §§ 308(a), 609.

73. *See id.* § 637.

74. *See id.* § 608.

75. *See id.* § 621(c).

76. Unif. Parentage Act § 621 cmt. (Discussion Draft 2000). This language does not appear in the final document.

77. One laboratory explicitly recognizes the possibility of a two-step process in its advertising of home identity testing: "Fairfax Identity Laboratories would like to be clear: if your results do have to be presented in a legal proceeding, then HIT™ may not be suitable for you. It can, however, be used to give a preliminary answer prior to having the sort of test performed that requires the proper chain of custody." Fairfax Identity Laboratories, Home Identity Testing (HIT™), *at* http://www.fairfaxidlab.com/idlab/hitcopy.html (visited Oct. 21, 2003). Where testing is performed at a laboratory, greater control is possible. For example, in its "Answers to the Most Common Questions About Parentage Testing," CBR Laboratories stated that as a matter of policy it required an order for testing from a lawyer, doctor, nurse practitioner, or representative of the court or the Department of Social Services or Revenue, and that the person seeking testing of a child, if not accompanied by the mother, was required to show proof of custodial rights. CBR Laboratories, Paternity Testing FAQs, *at* http://www.cbrlabs-inc.com/paternity-testing-faqs.html (visited Nov. 11, 2002).

Largely in response to mail-order or home testing, the United Kingdom established an ad hoc Group on Genetic Paternity Testing Services to develop a code of conduct for laboratories performing testing. *See* Group on Genetic Paternity Testing Servs., Code of Prac. & Guidance (2001). The code is not itself law, but through other law it is binding on courts in ordering testing, and government agencies and public bodies are also expected to comply. *See* Rosemary Bennett, *Paternity Test Companies to Get Code of Conduct,* Fin. Times (London), Mar. 24, 2001, at 2. In the United States, the standards of accrediting agencies address such matters as informed consent and confidentiality, but accreditation is voluntary. *See, e.g.,* Am. Ass'n of Blood Banks, Standards for Parentage Testing Laboratories (Am. Ass'n of Blood Banks 5th ed. 2001).

NOTES

78. Del. Code Ann., tit. 13, §§ 8-101 (2003); Tex. Fam. Code Ann. § 160 (Vernon 2003); Wash. Rev. Code Ann. § 26.26 (West 2003); Wyo. Stat. Ann. § 14-2-121 (Michie 2003). Only the Wyoming version incorporates the 2002 revisions, which equalized the treatment of marital and nonmarital children by creating a presumption of paternity outside of marriage under certain circumstances, and by extending judicial discretion to limit genetic testing to children with acknowledged as well as presumed fathers. (A bill signed by Governor Perry on June 20, 2003, amends the Texas law to reflect the 2002 revisions.) Of note, Texas substituted a four-year time limit for the UPA 2000's two-year limit. Tex. Fam. Code Ann. § 160.607. Wyoming substituted a five-year time limit for the UPA 2000's two-year limit for proceedings involving children with presumed fathers, while retaining the two-year limit for proceedings involving children with acknowledged or adjudicated fathers. Wyo. Stat. § 14-2-709. In the case of Washington, the new law must be interpreted in light of precedents making the best interest of the child the paramount consideration and applying equitable doctrines rather freely to advance the interests of children.

79. Glennon, *Somebody's Child, supra* note 26, at 569–70.

80. Am. Law Inst. (ALI), Principles of the Law of Family Dissolution: Analysis and Recommendations (Matthew Bender 2002) [hereinafter ALI Principles].

81. ALI Principles § 2.03. The comments to the definitional section include a review of the case law. The drafters conclude that, at present, many courts "decline to apply any equitable theory, even under very compelling circumstances." ALI Principles § 2.03 Reporter's Notes cmt. b.

82. ALI Principles § 3.03. Concerning the interaction between equitable theories and the marital presumption, *see* § 3.03 cmt. d; § 3.03 Reporter's Notes cmt. d.

83. Glennon, *Expendable Children, supra* note 27, at 275.

84. *Id.* at 277.

85. Joe Follick, *Court to Rule on DNA Impact on Child Support,* Tampa Trib., Aug. 30, 2000, at 6 (quoting Justice Major Harding).

86. *In re* Paternity of Cheryl, 746 N.E.2d 488, 495 (Mass. 2001). This approach may also reflect concern that situational factors limit the practical relevance of existing due process protections. For example, some men may decline genetic testing out of embarrassment. *See* Office of the Inspector General, U.S. Dept. of Health & Human Servs., Paternity Establishment: State Use of Genetic Testing 3 (U.S. Dept. of Health & Human Servs. 1999).

87. Glennon, *Expendable Children, supra* note 27, at 281; *see also* Glennon, *Somebody's Child, supra* note 26, at 605.

88. Cauthen v. Yates, 716 So. 2d 1256 (Ala. Civ. App. 1998); *see also* County of El Dorado v. Misura, 38 Cal. Rptr. 2d 908 (Cal. Ct. App. 1995); Christopher L. Blakesley, *Scientific Testing and Proof of Paternity: Some Controversy and Key Issues for Family Law Counsel,* 57 La. L. Rev. 379 (1997).

89. Manning v. Manning, 764 So. 2d 311 (La. Ct. App. 2000).

90. Unif. Parentage Act § 505 & cmt. (2000).

91. *See, e.g., Ex parte* Jenkins, 723 So. 2d 649 (Ala. 1998).

92. *In re* Kates, 761 N.E.2d 153 (Ill. 2001).

93. *In re* Paternity of Cheryl, 746 N.E.2d 488, 500 n.23 (Mass. 2001) (citations omitted).

94. Quest Genetics, *at* http://www.dnatestingusa.com/GrandparentDNAtest.html (visited Oct. 22, 2003).

95. "In addition to concerns for reliability [in the case of unauthorized DNA testing], there are legitimate public policy concerns over privacy interests such as the dangers of unauthorized disclosure of genetic information and possible genetic discrimination by entities such as insurance companies and employers." *In re* T.S.S., 61 S.W.3d 481, 487 n.5 (Tex. Ct. App. 2001).

96. Concerning the due process and equal protection issues that may arise where a statute grants grandparents rights that may conflict with parents' interests, *see* Karl H. Widell, Case Note, *Court of Appeals of Arizona Upholds Grandparent Visitation Under Arizona Statute,* 43 Ariz. L. Rev. 495 (2001).

97. H.J. Sants, *Genealogical Bewilderment in Children With Substitute Parents,* 37 Brit. J. Med. Psychol. 133 (1964).

98. Cal. Fam. Code § 7570(a) (West 1994 & Supp. 2003).

99. Courts often couple medical interests and "truth of origins" interests. *See Ex parte* Snow, 508 So. 2d 266 (Ala. 1987) (child has interest in knowledge of heritage, accurate medical history); Hall v. Lalli, 977 P.2d 776, 781 (Ariz. 1999) (child has interest in family bonds and learning cultural heritage); Russell v. Russell, 682 N.E.2d 513 (Ind. 1997) (citing medical and psychological reasons for

NOTES

identifying biological parent); D.B.S. v. M.S., 903 P.2d 1345 (Kan. 1995) (in best-interest analysis courts "can also consider the child's basic interest in simply knowing his or her biological father"); Raymond v. O'Rourke, 1993 Minn. App. LEXIS 153 (Minn. Ct. App. 1993) (unpublished opinion) (child has interest in having "actual biological father" determined); Cihlar v. Crawford, 39 S.W.3d 172 (Tenn. Ct. App. 2000) (children have interest in ascertaining the identity of their biological parents for medical or other health reasons); State *ex rel.* Roy Allen S. v. Robert B. Stone, 474 S.E.2d 554 (W. Va. 1996) (examples of factors to be considered in both the standing and paternity determinations include "whether ascertaining genetic information might be important for medical treatment or genealogical history"); and R.W.R. v. E.K.B. (State *ex rel.* N.D.B.), 2001 WY 118, 35 P.3d 1224 (2001) (citing Hall v. Lalli with approval). In *In re* Parentage of Calcaterra, 56 P.3d 1003 (Wash. Ct. App. 2002), the court looked approvingly on the quest of a 34-year-old woman for testing of the man she believed to be her natural father, citing her desire for a family medical history.

100. Glennon, *Expendable Children, supra* note 27, at 275.

101. *Id.* at 282.

102. The dissent in *Dawn D.* notes this "potential anomaly." *See* Dawn D. v. Superior Court, 72 Cal. Rptr. 2d 871, 890 (Cal. 1998) (Chin, J., dissenting).

103. For an overview of these and related studies bearing on genetic relationship and child and family welfare, *see* Susan Golombok, Parenting: What Really Counts? (Routledge 2000); *see also* Jennifer E. Lansford et al., *Does Family Structure Matter? A Comparison of Adoptive, Two-Parent Biological, Single-Mother, Stepfather, and Stepmother Households,* 63 J. Marriage & Fam. 840 (2001); A.J. Turner & A. Coyle, *What Does It Mean to Be a Donor Offspring? The Identity Experiences of Adults Conceived by Donor Insemination and the Implications for Counseling and Therapy,* 15 Hum. Reprod. 2041 (2000); Susan Golombok et al., *Social Versus Biological Parenting: Family Functioning and the Socio-Emotional Development of Children Conceived by Egg or Sperm Donation,* 40 J. Child Psychol. & Psychiatry 519 (1999).

104. Michael H. v. Gerald D., 491 U.S. 110, at 118 (1989).

105. *Paternity Test,* Economist, Jan. 30, 1999, at 74. Offspring with two to three males in the father role seem to fare the best. Some judges have sought to normalize such arrangements. For example, a Tennessee court wrote: "In our resolution of this appeal, we have not overlooked the Trial Court's concern that the child would have two legal fathers should the case proceed and DNA prove that Mr. Gibson is in fact the father. While we concede this is a rather anomalous situation, we note where an adoption occurs, the adoptive father is father by virtue of the adoption, while the biological father is in fact also the father." Chance v. Gibson, 2002 Tenn. App. LEXIS 598 (Tenn. Ct. App. 2002). Others observe that such arrangements may be beneficial. *E.g.,* Martin v. Harrell, 2002 Conn. Super. LEXIS 1851 (Conn. Super. Ct. 2002) ("Rather than being confused or damaged by the circumstance of having two fathers, [the child] seems to accept this and even approximates the benefits of double the paternal love").

106. *See* Rubright v. Arnold, 973 P.2d 580 (Alaska 1999).

107. Walter v. Gunter, 788 A.2d 609 (Md. 2002). The Maryland Legislature continued to consider limits to paternity testing orders in 2002. Maryland House Bill 702 would have imposed a three-year limit on orders for testing to support challenges to declarations of paternity, and House Bill 478 would have permitted only prospective relief from support orders in the event of disestablishment of paternity. The House Judiciary Committee delivered unfavorable reports on both bills, which then died.

108. *Id.* at 625 (Wilner, J., dissenting). For a discussion of other concerns, e.g., federal requirements, *see* Paula Roberts, Truth and Consequences Part III: Who Pays When Paternity Is Disestablished? (Ctr. for Law & Soc. Pol'y, Apr. 2003), *at* http://www.clasp.org (visited Oct. 21, 2003).

109. Linda L. Berger, *Lies Between Mommy and Daddy,* 33 Loy. L.A. L. Rev. 449, 490–01 (2000).

110. *Id.* at 501–02.

111. Wis. Stat. Ann. § 767.115(b) (West 2003).

112. Rebecca R. v. David R., 62 Cal. Rptr. 2d 730 (Cal. Ct. App. 1997) (opinion withdrawn from publication).

113. Stitham v. Henderson, 2001 ME 52, 768 A.2d 598, 603–04 (2001).

114. Apparently, some attorneys are counseling clients to avoid all contact with a child in order to enhance their chances for success in court. Gerald Miscovich told a reporter that he wanted to play "some part" in the boy's life but had been advised that to do so would undercut his case. *See* Willing, *supra* note 6, at 1A.

NOTES

115. R.W.R. v. E.K.B. (State *ex rel.* N.D.B.), 2001 WY 118, 35 P.3d 1224, 1228 (2001). This is a prelude to agreement, with the mother, one of the presumed fathers, the guardian ad litem, and the district court, with the proposition that "'the truth' was the best result that could be salvaged."

116. *Id.* at 1232.

117. Dye v. Geiger, 554 N.W.2d 538, 541 (Iowa 1996).